No. 90-569

IN THE

Supreme Court of the United States

October Term 1990

N.A.A.C.P., DETROIT BRANCH; THE GUARDIANS, INC.; BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTIHA CHEATOM; EVIN FOBBS; JOHN H. HAWKINS; HELEN POELNITZ, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); DAVID WATROBA, PRESIDENT; CITY OF DETROIT; COLEMAN A. YOUNG, MAYOR; DETROIT POLICE DEPT.; BOARD OF POLICE COMMISSIONERS; WILLAM A. HART, CHIEF,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO GRANTING THE WRIT

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A. City Respondents Have Distorted The Issues In This Case.

Petitioners make this reply because of our concern that Respondents have distorted the nature of the case and the record.

This case involves constitutionally-imposed afffirmative duties, not voluntarily adopted affirmative action. At issue and at stake are the continued vitality of this Court's rulings beginning with *Brown v. Board of Education (II)*, 39 U.S. 294 (1955) that the State has an affirmative and constitutionally based obligation to dismantle state-sanctioned and imposed intentional, *de jure*, racial discrimination and its effects. This Court has instructed the nation in an unbroken line of cases from *Brown* to *Paradise*,[1] and most recently in *Missouri v. Jenkins*, 110 S.Ct. 1659 (1990) and that this affirmative duty is in existence until all vestigial effects of the intentional discrimination or segregation are purged. This Court has held that the duty to dismantle the effects of state imposed and sanctioned intentional racial discrimination and segregation must is continuing and must proceed, regardless of the popularity or unpopularity of the relief ordered. *Alexander v. Holmes*, 396 U.S. 19 (1969); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Swann v. Charlotte-Mecklenburg School Board*, 402 U.S. 1 (1971). Budgetary excuses cannot be raised to shield a failure to comply with constitutional duties.[2] *Missouri v. Jenkins, supra.*

City Respondents mention, but then ignore, findings of intentional discrimination made against the City and Police Department in *Baker v. City of Detroit*, 483 F.Supp 930 (E.D.

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[1] *United States v. Paradise*, 107 S.Ct. 1053 (1987).

[2] Consider the signal if this Court were to let the lower court's ruling stand. Such a ruling would allow cities and states throughout this nation to wink at their constitutional obligations whenever budgets are tight.

Mich 1979), *aff'd* sub nom *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983). District Judge Gilmore correctly characterized the import of the findings of intentional discrimination in *Baker v. City of Detroit, aff'd* sub nom *Bratton v. City of Detroit, supra,* as follows:

> "*Bratton* and *Baker* found that, at least until 1968, the City of Detroit 'employed a consistent overt policy of intentional discrimination against blacks in all phases of its operations.[3] *Bratton, supra,* at 888.

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[3]Beginning on Page 940 of his Opinion in *Baker, supra,* Judge Keith documented the "History of past discrimination in the Detroit Police Department."

He called it a "sad and sorry history." (*Id.* at 940) He began with the 1943 race riot in Detroit and quoted from the report of the riot written by NAACP Executive Secretary Walter White and the now Justice Thurgood Marshall: "The trouble reached riot proportions because the police of Detroit enforced the law under an unequal hand." (*Id.* at 966) Judge Keith, ***inter alia***, found that from 1944 to 1953, 3005 whites and 117 blacks were hired in the department. This resulted in a virtually all-white police force. The supervisory ranks were virtually barren of blacks. The few blacks that were hired were strictly segregated. They were limited in their patrol assignments to certain areas and had to walk a beat until a vacancy in a "black" scout car opened up. A white officer's consent had to be obtained before he could be assigned to ride with a black officer. Blacks were used to do undercover work only in black areas. (*Id.* at 941-943) Judge Keith described the department's employment practices from 1954-1960 as remaining the same as they were between 1943 and 1954). By 1960 only 3 percent of the force was black (as compared with the Wayne County Sheriff's Department which was 30 percent black). (*Id.* at 942).

The first attempt to desegregate scout cars in 1959 was met with strong opposition by white officers. From 1960-1967, change was very slow. Between 1961 and 1966, 1080 whites and 86 blacks were hired. The number of blacks in command ranks was "truly minuscule." Judge Keith found that a key reason why the police department in 1967 was so overwhelming white (94 percent white to 6 percent black) was that the hiring process has been "riddled with discrimination for years." (*Id.* at 942-947)

Judge Keith also recounted the 1967-1974 employment practices in both

> Since the *Baker-Bratton* decisions were in the context of suits by white officers challenging the City's voluntary affirmative action plan, neither Judge Keith nor the Sixth Circuit had to reach the obvious corollary of these findings — that this consistent policy of intentional discrimination was in violation of the Fourteenth Amendment, which prohibits all invidious racial discrimination. *See Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). The record in *Baker* is 'replete with evidence', *Bratton, supra*, at 888, of invidious racial discrimination against blacks in the Detroit Police Department prior to 1968."
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> *NAACP v. DPOA*, 591 F.Supp 1194-1199 (E.D. Mich 1984) (A.12-13) (footnote added)

City Respondents concede that the District Court found the City violated its "affirmative duty" but then proceed to ignore that any obligations or duties existed. District Court Judge

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Footnote 3 continued
hiring and promotions. (*Id.* at 948-958) The City's evidence, presented through the expert testimony of Alan Fechter confirmed the existence of discrimination in both hiring and promotion. (*Id.* at 958-965) Because *Baker* was a promotion case, the Court examined at length the promotion model in 1974 which was in existence when the challenged affirmative action plan was implemented. (*Id.* at 965-978). Judge Keith, at various times in his Opinion, commented on the deleterious impact the discriminatory practices of the Department had on the community and police-community relations. He described how the Department was justifiably regarded as an "occupation army" in the black community. The role of the police in the riots of 1943, 1967 and incidents thereafter showed the friction between the black community and the police to have been a trigger for these outbreaks. (*Id.* 996)

All of the evidence chronicled by Judge Keith from Pages 940 to 979 led him to conclude and find that, "In this case the evidence shows intentional discrimination against blacks through at least 1967-1968 when the Detroit riot caused people to sit up and take notice." (*Id.* at 992)

Gilmore not only noted the existence of the duties, he described them at length.[4]

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[4] "Based on these judicial findings of past discrimination it is clear the City had an affirmative obligation to eliminate the continuing effects of past racial discrimination and to eliminate all racial discrimination 'root and branch.' *Green v. County School Board*, 391 U.S. 430, 438, 88 S.ct. 1689, 1694, 20 L.Ed.2d 716 (1967). *See also Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 14, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 (1971) *Keyes v. School District No. 1*, 413, U.S. 189, 200 n. 11, 93 S.Ct. 2686, 2693 n. 11, 37 L.Ed.2d 548 (1973). The City had notice of all of these judicial findings as of October 1, 1979 when Judge Keith's opinion in ***Baker*** was issued.

NAACP v. DPOA, supra, at 1200
(A.13)

* * *

In its motion for reconsideration of this Court's order of partial summary judgment, the City objects to the finding of intentional discrimination at the time the City began its layoffs in 1979, and attempts to attach particular significance to general definitions of intent in the racial discrimination field, which hold that foreseeable results and discriminatory impact, ***without more, do not establish discriminatory purpose***. *See e.g. Columbus Board of Education v. Penick*, 443 U.S. 449, 464, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1975), *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979). This is not the situation here. Here we have the 'more' — the judicial findings of past intentional discrimination made by Judge Keith in *Baker*, and affirmed by the Sixth Circuit in *Bratton*.

Given this past finding of intentional discrimination, the City becomes liable every time it knowingly and foreseeably breaches its affirmative obligations to remedy this discrimination. The remoteness in time from the original act of intentional discrimination does not make later acts any less intentional. *Keyes, supra*. 'Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.' *Columbus Board of Education v. Penick, supra* 433 U.S. at 459, 99 S.Ct. at 2947. Thus, the City's discussion of the particular intent of the City in 1979-80 is post

The District Court furthermore found that the layoffs in 1979 and 1980 were infected with racial considerations contrary to City Respondents' assertion at Page 3. It was noted by the District Court and conceded by the City, that in 1979 and 1980, the City made a politically expedient decision that it would rather face a lawsuit by black police officers than white police officers.[5] *NAACP v. DPOA, supra*, at 1201 (A.18); *NAACP v. DPOA*,676 F.Supp 790, 796 (E.D. Mich 1988) (A.79).

The Respondents here, and the Court of Appeals below, simply misconstrue the nature of these findings and, consequently, of the appropriate remedies which flow from them. Because of this error, City Respondents argue that there is no conflict between circuits, nor conflict between this Court's decisions and decision of the Court of Appeals herein.

City Respondents suggest (*Id.* at 3) that Courts of Appeals "have consistently upheld the operation of last-hired-first fired seniority rules which typically govern employee lay offs —

Footnote 4 continued

> *Brown I* conduct of the school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.' (Citations omitted). *Dayton Board of Eduation v. Brinkman*, 443 U.S. 526, 538, 99 S.Ct. 2971, 2979, 61 L.Ed.2d 720 (1979)."
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> *NAACP v. DPOA, supra* at 1201, 1202 (A.17)

[5]This finding is not inconsistent with Judge Gilmore's finding ascribing no racial animus to *Mayor Young*. This Court has made clear that it is illegal to use racial factors in adverse employment decisions, regardless of whether the racial factors are based on the *animus* of the actors or the *political judgment* of the actors. See, e.g., *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (wherein the court found Title VII and § 1981 were violated when a union, not found to have racial animus towards blacks generally, declined to press claims of racial discrimination because the union categorized such grievances as unworthy of pursuit).

. . . against challenges that such rules perpetuate the effect of past hiring discrimination." Several cases are listed for that proposition.

Omitted from the list of cases cited are *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir. 1982) and *Arthur v. Nyquist*, 712 F.2d 816 (2nd Cir. 1983) which are the two cases where, in the face of findings of intentional discrimination against state actors, the Court of Appeals *did modify seniority* requirements in order to prevent an abandonment of affirmative constitutional duties.[5] See also, *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983).

It is not constitutionally significant that the findings of intentional hiring discrimination in *Morgan, supra,* and *Arthur, supra,* were made in the context of school desegregation cases, where the constitutional rights of the students are of paramount concern.

Judge Keith in *Baker, supra,* found, nonetheless, that the discrimination in the Police Department impacted not only the individual officers, but the black citizens of Detroit. In Judge Gilmore's Opinions, both on liability and damages, he similarly found, "There are two constitutional violations which must be remedied — the harm resulting from the City's abandon-

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[6]The only case cited by City Respondents that involves layoffs by a state actor is *Chance v. Board of Examiners*, 534 F.2d 993 (2nd Cir. 197 6). *Chance* was brought under 42 U.S.C. § 1983 because at the time Title VII did not apply to municipalities.

The plaintiffs in *Chance* had challenged the discriminatory impact of a test that was required by the Board to promote administrators. The court found *de facto* — not intentional discrimination. It adopted an analysis similar to the one in *Griggs v. Duke Power* 401 U.S. 424 (1971) to invalidate the test. The layoff issue arose when it came time to determine dates of promotion for purposes of "excessing" administrators. *Chance, supra* simply did not involve findings of intentional discrimination against a state actor.

ment of its black officers and the harm to the black community if the police force is returned to the days of racial segregation." *NAACP v. DPOA, supra,* at 1204 and 1209 (A.23, A.32) Thus, just as the violations against the *black students* in *Morgan* and *Arthur* were held to justify employment relief as part of the remedy, so the finding by Judge Gilmore of violations against the *black citizens* herein permitted the employment relief ordered.

There is no case which Respondent has cited where § 703(h) of Title VII was used as a statutory bar to remedying a constitutional violation in a strictly constitutional case such as this one.

City Respondents state that because the layoffs in question were pursuant to an allegedly bona fide seniority system, and because the courts did not ascribe racial animus to Detroit and its officials, a determination that the layoffs violated the constitution is precluded. (City Response at 6)

This argument totally ignores the plethora of Supreme Court cases cited in the Petition that hold an abandonment of an affirmative duty is actionable regardless of the intent associated with the abandonment.[7] *Columbus Board of Education v. Penick, supra; Dayton Board of Education v. Brinkman, supra.* The duty arises from the findings of intentional discrimination and this court has consistently said no retreat from remedying the effects of that discrimination may be made until the job is complete. See *Green v. New Kent County, supra; Col-*

[7]Even though it was not necessary for the court to find race was a factor in the City's decision to lay off blacks in the Police Department, the District Court, as noted *surpa,* found the layoffs were racially motivated and that they were done with the full knowledge that they represented an abandonment of an affirmative remedial duty. *NAACP v. DPOA, supra* at 1199 and 1201 (A.12, A.28).

umbus Board of Education v. Penick, supra; Keyes v. School District No. 1 Denver, Colorado, supra.

Respondents seek to make much of the fact that Petitioners did not mention *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Petitioners omitted mention of *Wygant* because it is not applicable to this case. A careful reading of *Wygant* shows that if the findings of past intentional discrimination that exist in the present case had been made as an underlying predicate for the race-conscious collective bargaining agreement provision challenged in *Wygant*, this court would have most likely been unanimous in upholding some form of a racially proportionate layoff plan. But the present case does not implicate *Wygant*.

In the present case, there were clear findings of intentional discrimination. Furthermore, the seniority system was in no way abrogated in the relief ordered by the District Court.[8] In fact, there is nothing in the record to establish that the City had to solve its budgetary problems through massive layoffs in the Police Department. At that time, the Police Department was the *only* department controlled by the Mayor against which findings of intentional discrimination had been made. As established in the District Court, the City ignored the fact that cuts could have been made elsewhere in the City budget. Other cuts would have avoided the City's interference with the constitutional remediation within the Police Department.

The Court of Appeals ignored that no Title VII complaints were filed by Plaintiffs, yet insisted on applying Title VII as a limitation to constitutional remediation. Since no decision of this Court sanctions such as a result, the Petition for Certorari should be granted so that the legal errors below can be addressed and corrected.

[8]The relief provided, *inter alia*, for the recall by seniority of all officers, black and white.

B. DPOA Respondents Were Found Guilty Of Intentionally Discriminating Against The Black Officers.

In reversing the District Court's finding that Respondent DPOA had violated the duty of fair representation, the Court of Appeals stated there had been no finding of intentional discrimination by the union against its members or that its defense of seniority was improper. The Court of Appeals, nonetheless, recognized that the District Court's findings supported a 42 U.S.C. § 1981 claim because the case was explicitly remanded for findings on that issue. *NAACP v. DPOA, supra.* (A.66)

DPOA Respondents distort the record when they fail to mention that, on remand, the District Court made explicit what had previously been implicit in its ruling. *NAACP v. DPOA, supra,* (A.85) The District Court stated: ". . . it is impossible to fairly read the Court's findings concerning the DPOA's history, before, during and after the 1979 and 1980 layoffs without concluding that the DPOA was, indeed, guilty of intentional discrimination." *NAACP v. DPOA, supra* (A.81-82).

To imply that there were no findings of intentional discrimination against the union in violation of § 1981 in this record is to fundamentally distort the District Court's ruling on remand.

C. This Court May Consider The Duty Of Fair Representation.

At the time that the Court of Appeals reversed this District Court's ruling of the duty of fair representation claim in 1987, *NAACP v. DPOA,* 821 F.2d 328 (6th Cir. 1987), and remanded the § 1981 claim, Petitioners did not seek review of the case as the remand left open the possibility that errors could

be cured and the desired relief obtained. This Court has had occasion to review whether a party in Petitioners' situation must appeal before remand or forfeit review of an issue decided in a first appeal. In *Panama Railroad Co. v. Napier Shipping*, 166 U.S. 280,284 (1987), this Court, in deciding whether any such limitation on its review powers existed, held;

> ". . . No such limitation applies to this Court when in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record. Upon such a writ, the entire case is before us for examination."

See also, *Christiansen v. Colt Industries*, 486 U.S. 800 (1988).

CONCLUSION

For these reasons, and the reasons stated in the original Petition, the request for the Writ of Certiorari should be granted.

Respectfully sumitted,

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